

ETHICS ADVISORY COMMITTEE

STATE OF NORTH DAKOTA

OPINION 2000-1

ISSUE

Whether a judicial candidate, other than a current office-holding judge/justice (referred to herein as "judge/justice"), may omit in campaign advertisements and literature words such as "for" or "elect" in conjunction with the name and position sought.

ANSWER

This opinion addresses the specific situation in campaign advertisements in which a judicial candidate, other than a judge/justice, does not include the word "for" and/or "elect" in conjunction with the candidate's name and the title of the position sought.⁽¹⁾

Pertinent to this issue, Canon 5A(3)(d)(iii) of the North Dakota Code of Judicial Conduct specifies that:

(3) a candidate for a judicial office:

(d) shall not:

(iii) knowingly misrepresent the identity, qualifications, present position or other facts concerning the candidate.

Under the terminology section, "knowingly" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

More generally, Canon 5A(3)(a) provides that a candidate for judicial office "shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity of the judiciary...".

In contested judicial elections, the accuracy of the campaign advertisement and campaign literature is the responsibility of the candidate. Under Canon 5A(3)(d)(iii), a candidate should not misrepresent his/her qualifications or present position. A candidate, who has never served as a district judge or justice of the supreme court, should not leave the impression or inference that they currently hold such a title or position. Any advertisement that merely places the candidate's name next to the position they seek, without some clarity or distinction that it is the position they are seeking but do not currently hold, is a distortion of the truth.

The committee concludes that a candidate, who is not currently in the position, is not in conformity with the North Dakota Code of Judicial Conduct by using only the name and title of office without some connective word since it infers a misleading identity and status. The candidate, other than a judge/justice, must use connective language such as "elect" or "for" in lettering of sufficient size to be clearly visible to the public. A separate written or oral statement to the contrary by the candidate is not adequate to negate the erroneous impression arising from the misleading advertisement.

The candidate has an affirmative obligation to not create the misleading information or advertisement. N.D.C.J.Cond. 5A(3)(d)(iii). The impression in the mind of the viewer is not a controlling factor but rather the actual knowledge of the candidate. After consideration of the "knowingly" definition, the committee concludes a candidate could surely infer that a campaign advertisement without some type of reasonably sized connective words would be misrepresentative of the candidate's current position.

In other states, this issue has been resolved to ensure a high standard of accuracy in campaign literature and advertisements. By way of example,

A candidate for a Kentucky judicial post was reprimanded for distributing campaign materials falsely representing that he was the incumbent by using the phrase "John Doe District Judge" Order of Private Reprimand, 7 Accent on Court 23 (1985).

A non-judge candidate's campaign materials should use language such as "elect" or "for" (e.g. "Elect John Doe District Judge" or "John Doe for District Judge") in lettering of sufficient size to be clearly visible to the public. Order of Private Reprimand, Ky. Judicial Retirement & Removal Commission, 1992.

The phrase "for judge" should be used after a non-incumbent candidate's name and the "for" should be in the same or almost same size type as the name and "judge". New Mexico Advisory Opinion 92-3.

Yet, a recent Pennsylvania case takes a different view when a candidate currently holding a judicial office is running for a different judicial office. A district justice was seeking a position on the Court of Common Pleas. His campaign literature used the words "Dave Miller Judge" with a line between the name and the position. The commission did not find a misrepresentation by this candidate based in part upon his current judicial status and also on the line separation, which they recognized as a "convention" long utilized to announce that the person above the line is running for the office identified below the line. In re: Miller 2000 WL 1455819. (See also In re: Roberts 675 NE2d 84 (Ohio 1996).

The committee is cognizant of changing national trends to support free speech in judicial elections. However, North Dakota still elects judges/justices on the No-Party ballot and the Code prohibits candidates from involvement with political parties. Advertising techniques or campaign actions acceptable to political party candidates may not be appropriate for judicial candidates under the Code of Judicial Conduct. We therefore believe the guidance provided in this opinion represents a reasonable and permissible restriction on the manner of advertising allowed in judicial elections.

1. ¹ This Opinion expressly does not address those situations in which a current office-holding judge, or a former judge, runs for a judicial position formerly held by that person, or for a different judicial position.